

VIRGINIA CODE COMMISSION

Thursday, May 7, 2009 – 10 a.m.

General Assembly Building, 6th Floor
Speaker's Conference Room
Richmond, Virginia 23219

MEMBERS PRESENT: R. Steven Landes, Chairman; Ryan McDougale; Jane M. Roush; Robert L. Calhoun; Thomas M. Moncure, Jr.; William R. Janis, Frank S. Ferguson

MEMBERS ABSENT: John S. Edwards, E.M. Miller, Jr.; James F. Almand

OTHERS PRESENT: Brian Kennedy and Anders Ganten, LexisNexis; Chris R. Nolen, Williams Mullen; Jeannine Rose, Department of Planning and Budget; Todd Rose, State Corporation Commission

STAFF PRESENT: Frank Munyan, Elizabeth Palen, David Cotter, Lilli Hausenfluck, Jane Chaffin

CALL TO ORDER

Delegate Landes called the meeting to order at 10:05 a.m.

APPROVAL OF MINUTES

Mr. Ferguson noted that he did not attend the October meeting; however, the minutes reflect that he seconded a motion to adjourn that meeting. Staff was asked to make the appropriate correction. Mr. Moncure made a motion to approve the minutes of the October meeting, as amended. Mr. Ferguson seconded the motion, and the motion was approved.

ADMINISTRATIVE LAW ADVISORY COMMITTEE

Chris Nolen, chair of the Administrative Law Advisory Committee (ALAC), presented ALAC's proposed work plan for the next year. ALAC's work plan includes continuing the study of incorporating documents by reference into regulations, focusing on the emergency regulations process, and updating the hearing officer handbook. As the Joint Legislative Audit and Review Commission (JLARC) is studying Administrative Process Act exemptions this year, ALAC will work with JLARC, as appropriate, and ALAC's focus will turn to reviewing the process and rationale for promulgating emergency regulations. The hearing officer handbook was last updated by ALAC 10 years ago, and the Supreme Court supports ALAC's desire to take on the task again. The Appeals Work Group completed its work last year, and the Code Commission approved forwarding recommendations to amend Part 2A of the Supreme Court Rules to the Supreme Court. Those recommendations are currently under review and consideration by the Supreme Court. Mr. Ferguson made a motion, seconded by Mr. Calhoun, to approve the ALAC work plan. The motion was approved. The Chairman stated that he would like to invite JLARC to report its findings and recommendations of the APA exemptions study to the Code Commission.

Mr. Nolen advised the Commission members that J.P. Jones resigned from ALAC last fall, and suggested that the Commission consider appointing Thomas A. Lisk to fill the vacancy. Mr. Lisk's biographical information is provided in the meeting materials. Senator Calhoun made a motion, seconded by Mr. Ferguson, to appoint Mr. Lisk to fill the vacancy left by the resignation of Professor Jones. The motion was approved.

2009 LEGISLATIVE SESSION UPDATE

Jane Chaffin reported that the six Code Commission-sponsored bills passed both houses of the General Assembly and were signed by the Governor. Chapters 33, 34, 35, and 108 relate to the obsolete laws project (repeal bills); Chapter 107 corrects technical errors related to the Title 3.2 recodification passed last year; and Chapter 471 sets out the full text of the Richmond Metropolitan

Authority (RMA) charter in Title 15.2. The bills passed as introduced, except Chapter 107, which passed with a Senate floor substitute, and Chapter 46, which passed with clarifying amendments.

2009 WORK PLAN

The Commission discussed title revisions and other projects to include on its 2009 work plan. The Title 6.1 recodification is expected to be completed this summer and ready for prefilings for introduction at the 2010 General Assembly session. Title 64.1, Wills and Decedents' Estates, was suggested as the next title to undertake for recodification. Title 64.1 was last recodified in 1968 and DLS staff attorney David Cotter is available to begin working on this title. The Title 64.1 work group should also look at Title 26, Fiduciaries, to determine if it should be incorporated into proposed Title 64.2.

Other projects on the work plan include the following: (i) review compilation of Code Commission policies; (ii) continue with the obsolete laws analysis project required by § 30-151 (statute requires reporting at least every four years, but it was suggested that reporting should be in even-numbered years when there are less restrictions on bill limits for House members); (iii) revise the Virginia Code Commission regulations implementing the Virginia Register Act, which were last revised in 1994; and (iv) review signature/certification requirements for regulation filings and determine if amendments are needed to the Virginia Register Act or Administrative Process Act in order to eliminate paper copy filings of regulations and accept only electronic filings of regulations.

Senator Calhoun advised the Commission that he has been appointed to a Boyd-Graves Conference study committee tasked with reviewing the Code of Virginia for obsolete fee provisions. It is anticipated that over 700 code sections could be affected, and the project is expected to take two years to complete. Senator Calhoun suggested that the Commission add monitoring the progress of this Committee to its work plan, and he offered to update the Commission on the committee's work during the course of this study.

It was suggested that the last item on the work plan, monitor progress of Virginia Rules of Evidence, be removed until such time as the Virginia Supreme Court decides to adopt formal rules of evidence.

Mr. Ferguson made a motion, seconded by Delegate Janis, to approve the 2009 work plan, as amended.

TITLE 6.1, BANKING AND FINANCE

Frank Munyan reported that Chapter 16.1 of Chapter 6.1, relating to mortgage loan originators, was enacted since the Commission last met. Chapter 16.1 implements the requirements of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008. Mr. Munyan proposes designating Chapter 16.1 as Chapter 17 of Chapter 6.2 and renumbering subsequent chapters accordingly. 2009 legislative changes have been incorporated throughout the title revision.

Chapter 5, Equal Credit Opportunities

Chapter 5 currently resides in Title 59.1 as Chapter 2.3, but is proposed for inclusion in Title 6.2 because it pertains to credit transactions generally and provides authority to the State Corporation Commission to adopt regulations and investigate complaints. This chapter was enacted in the mid-1970s (counterpart to federal law) and prohibits discrimination in credit transactions. The federal law provides no preemption of state laws and authorizes election of remedies at either the state or federal level. A workgroup member questioned the necessity of the chapter because existing law states that compliance with the federal act and regulations constitutes compliance with state law. Mr. Munyan explained that provisions exist authorizing the election of how to proceed when a violation occurs and how the SCC mediates disputes, and he believes that repealing the chapter would constitute a substantive change. Based on its discussion, the Commission decided to retain the chapter.

Chapter 7, Financial Institution Holding Companies

Mr. Munyan explained that Chapter 7 establishes requirements for acquiring control of Virginia financial institutions. A company may not acquire control of a Virginia-owned company without going through an application process and receiving approval from the State Corporation Commission.

While reviewing proposed subdivision 2 of § 6.2-702, Mr. Munyan asked whether the requirement for admission to transact business in accordance with § 13.1-757, which is currently limited to foreign corporations, should be expanded to apply to other foreign business entities. The Commission felt this change would be substantive and chose not to expand to foreign business entities. Mr. Ferguson expressed concern with the restructuring of proposed § 6.2-702 (§ 6.1-382). He suggested that dividing the section into separate subdivisions may have changed the original meaning and recommends placing the language in one paragraph. The Commission agreed and staff will redraft the language.

Mr. Munyan stated that proposed § 6.2-705 is derived from § 6.1-383.1 C and he is researching to determine whether the provision is obsolete. He explained that out-of-state banks acquiring in-state banks was an issue years ago, and in 1980 the U.S. Supreme Court dealt with a Florida statute related to this matter. Congress passed the Riegle-Neal Act, which repealed provisions authorizing similar sections. Staff has discussed the issue with Jay Spruill of the Virginia Bankers Association, and Mr. Spruill indicated that the provision may be unenforceable since this provision precedes the Riegle-Neal Act. Staff would like more time to make a determination on whether the provision is obsolete and will bring the issue back to the Commission after the work group addresses it.

The reference to repealed Section 408 of the National Housing Act has been updated to Section 10 of the Home Owners' Loan Act in § 6.2-708. Senator Calhoun asked if the work group is satisfied that this is a comparable replacement. SCC representatives will check to see if Section 10 should be referenced. Mr. Ferguson commented that if the updated act is anything more than a one-on-one replacement, at a minimum, a more comprehensive drafting note is needed for purposes of explanation.

Chapter 13. Credit Unions

In 1990, the Code Commission revised Chapter 4.01 of Title 6.1, from which proposed Chapter 13 is derived. Consequently, the language is not as outdated as in other chapters. Many proposed changes are structural.

Mr. Munyan explained that existing Article 6 (Share Insurance) of Chapter 4.01 of Title 6.1 is expanded to include the provisions of existing Chapter 4.1 (Virginia Credit Union Share Insurance Act). He also noted that the Virginia Credit Union League prefers to retain Chapter 4.1 as a separate chapter. After discussion, the Code Commission decided to include Chapter 4.1 in existing Article 6 of Chapter 4.01 to conform to the organizational structure of proposed Title 6.2.

Section 6.2-1303 covers regulatory authority of the SCC over credit unions. Proposed subsection A provides broad authority to adopt regulations to implement the provisions of the chapter. Staff asks whether the provisions on regulatory powers of the SCC are redundant and whether proposed subsections B and C can be combined into a single subsection. Mr. Ferguson recommends using the broader, more comprehensive authority. Judge Roush suggests retaining subsection B and striking subsection C. Mr. Ferguson also raised the issue of unconstitutional delegation of power.

In § 6.2-1305 (line 170), staff was directed to remove "whether in writing or orally" as unnecessary and overly restrictive.

The Commission discussed § 6.1-225.50 (page 50), which provides that §§ 6.1-225.48 and 6.1-225.49 apply to federal credit unions (payment of decedent's share account balance). Staff had proposed setting out in §§ 6.1-225.48 and 6.1-225.49 that their provisions applied to federal credit unions. Counsel to the Virginia Credit Union League suggested the same provisions be added to several other sections in proposed Article 8. The Credit Union League states that this section should be retained to make it clear that the state law would apply when there is no federal law. Staff concluded that, if

analogous provisions do not exist for other financial institutions, the best course would be to leave the section in its current form. Staff will come back before the Commission with a recommendation.

In subdivision 2 of § 6.2-1375 regarding investment of credit union funds (page 54), staff will change the phrase "25 percent of outstanding shares" to "25 percent of the investing credit union's outstanding shares" to clarify that the investment limitation is on the credit union's own investable funds.

CODE OF 1819

Chairman Landes stated that the terms of reproducing a facsimile copy of the two-volume 1819 Code of Virginia, the first legislatively adopted code, were provided as part of the latest Code of Virginia publishing contract between LexisNexis and the Virginia Code Commission. The Chairman extended his appreciation to those involved with the project, particularly LexisNexis, Tom Moncure, and Neil Hening. Mr. Moncure wrote the introduction, utilizing Mr. Hening's extensive research for a forthcoming biography of William Waller Hening. Members of the legislature received commemorative copies of the Code of 1819 and the Chairman has received a number of positive comments. It provides an excellent beginning in preparing for the 400th anniversary of the Virginia General Assembly. The Chairman thanked Mr. Hening for donating his time and work and presented him with a letter of appreciation.

Mr. Moncure explained that his goal was to write an introduction short enough that someone would read it. A lot of history is encapsulated in a few words. Also, he wanted to emphasize the fact that every so often a Code needs to be reorganized. The significance of the 1819 Code is that it was the first time the legislature officially adopted a code and repealed all prior enacted laws.

The Chairman introduced Brian Kennedy as the new LexisNexis representative working with the Code Commission. Mr. Kennedy has been with Lexis for 16 years.

REVISION OF TITLE 64.1

David Cotter, DLS Staff Attorney, reported that Title 64.1 was last revised in 1968. Mr. Cotter indicated that there is much interest from individuals to assist with the revision, including representatives from the Wills, Trusts and Estates Section of the Virginia Bar Association; the Trust and Estates Section of the Virginia State Bar; the Virginia Bankers Association; and clerks of court. Related provisions are scattered throughout the Code, and he will attempt to compile these provisions into proposed Title 64.2. In addition, he plans to review Title 26, Fiduciaries, with regard to incorporating that title into proposed Title 64.2. At the next meeting, Mr. Cotter plans to present a proposed work plan and names of those interested in serving on the work group.

TITLE 6.1, BANKING AND FINANCE

Mr. Munyan presented several outstanding issues:

1. Per Mr. Miller's request, staff compiled a chart of code provisions dealing with the treatment of licensees convicted of criminal offenses or subjected to civil actions. The intent of compiling the provisions is to discuss the practicality of making the provisions uniform and discuss any substantive changes that would be involved. It was suggested that the Commission might wish to consider setting a policy with regard to standardizing such provisions. Since Mr. Miller made the request and is not present at today's meeting, the Chairman deferred action on this issue until the next meeting.
2. Staff asked whether the Commission wants to consider uniformity with respect to civil penalties and fines that the State Corporation Commission (SCC) is authorized to assess against violators. Section 12.1-35 provides that collected penalties and fines are paid to the Treasurer of Virginia. One provision in Chapter 6 specifically states that civil penalties that are collected are to be deposited into the Literary Fund. Todd Rose with the SCC suggested that adding a section to the

1 general provisions clarifying that all civil penalties be paid in accordance with § 12.1-35 would
2 conform to existing practice. The Commission discussed the distinction between "penalty" and
3 "fine." A fine is a civil penalty. Mr. Ferguson suggests changing references to "penalty" to "civil
4 penalty" for clarification.

- 5 3. The Commission discussed the various ways that civil penalties are cited, such as "a fine not in
6 excess of," "a fine not more than," and "a fine or penalty not exceeding." The Commission decided
7 to make the language uniform by using the phrase "a civil penalty not exceeding."

8 Staff presented a number of issues with chapters that were previously reviewed by the Commission.
9 The Commission agreed with the resolution of the issues as presented today in the document titled,
10 "Code Commission Issues with Chapters Previously Reviewed," dated May 7, 2009, with the following
11 discussion:

- 12 1. Based on reservations expressed by the Code Commission, staff researched whether replacing the
13 existing definitions of "person" in the various chapters in Title 6.1 with the codewide definition in § 1-
14 230 would cause any substantive consequences. The work group consensus is that using the
15 definition in § 1-230 is a substantive change because the titlewide definition is broader than existing
16 law, primarily by including "any successor, representative, agent, agency, or instrumentality" of the
17 entities within the scope of the definition. The work group recommendation is to set out a titlewide
18 definition of "person" in Title 6.2 similar to the titlewide definition currently set out in Title 6.1.

19 The Code Commission discussed the codewide definition of "person" and the work group's
20 recommendation. The consensus of the Commission is to create a titlewide definition of "person" as
21 written in § 1-230, except to delete the language after "commercial entity" that reads, "and any
22 successor, representative, agent, agency, or instrumentality thereof."

- 23 2. In § 6.1-102 B, the existing provision regarding SCC's authority to increase fees applies to banks,
24 trust companies, savings institutions, industrial loan associations, credit unions, consumer finance
25 licensees, and mortgage lenders and brokers. With regard to credit unions, the SCC increases fees
26 through the SCC's regulatory process. With regard to the other institutions, the code sets a specific
27 dollar amount, and SCC may increase fees up to 50% of that amount. Fee increases over 50%
28 must be changed through the legislative process. The question is whether SCC's authority to
29 increase fees and assessments should apply to sections that do not fix the amount for a fee or
30 assessment, even though the entities are listed in § 6.1-2. Mr. Ferguson suggested that the
31 Commission ask SCC to suggest whether the SCC wants clarification and, if so, how the language
32 should be clarified. If the SCC wants clarification, the Commission can review the SCC's
33 recommendation and decide whether to make the change in the recodification or to introduce a
34 separate bill. Otherwise, leave the language as is.

35 Mr. Munyan stated that existing law is silent as to credit counselors, check cashers, mortgage loan
36 originators, money order sellers, and money transmitters and asked if these other regulated
37 financial institutions should be added to § 6.2-102 B. Mr. Ferguson advised that such change would
38 be substantive and should not be included in the recodification. To make the change, a separate bill
39 would be needed.

- 40 3. To clarify that service of a notice of lien under § 8.01-502 exempts an institution from complying
41 with either subdivision 1 or 2 of § 6.2-602 (existing § 6.1-2.9:7), staff previously proposed moving
42 the phrase "unless the institution is served with a notice of lien pursuant to § 8.01-502" to make it
43 qualify both subdivisions 1 and 2. The Code Commission asked staff to determine if the change
44 would cause any unintended consequences and to bring the issue back before the Commission.
45 Staff raised the issue with the work group, and the work group decided to present two options for
46 the Commission's consideration. Option 1 removes references to § 8.01-502 and Title 58.1 and
47 adds language that expands the exemptions to apply to all governmental agencies. Option 2 retains
48 the exemptions only for notices of lien under § 8.01-502 and Title 58.1.

1 The Commission decided to adopt Option 1 with an amendment to subsection C that reads, "any
2 notice of lien pursuant to § 8.01-502."

3 4. The Code Commission previously deferred a decision regarding changes to existing § 6.1-125.13
4 (proposed § 6.2-611) because the members felt the entire section was confusing and should be
5 rewritten in order to provide clarification. The section is part of the Uniform Multiple-Party Accounts
6 Act. The intent of the section is to pay expenses as itemized in the section if there are no other
7 assets from the estate. Jay Spruill, Virginia Bankers Association, prepared a draft that simplifies the
8 section, and the work group approved the draft. Mr. Ferguson made a motion, seconded by Senator
9 Calhoun, to approve the suggested draft. The motion was approved.

10 5. The Code Commission previously deferred a decision regarding changes to § 6.1-125.13 (§ 6.2-
11 613), which the Commission asked to be rewritten. After discussing the most recent draft and the
12 original proposed draft, the consensus of the Commission is to adopt the language as originally
13 presented by staff.

14 6. At a previous meeting, the Commission directed staff to clarify subsections B and C of proposed
15 § 6.2-2.17 (§ 6.2-1113). The revised version reinstates provisions of the existing text, which
16 distinguishes between material created by a committee and those that have been produced by a
17 committee and delivered to a governmental agency. The Commission discussed proposed
18 subsection E of § 6.2-1113, which is existing language that is derived from the definition of
19 "compliance review committee." Mr. Ferguson stated that subsection E should be limited to the
20 work product created by any person "while acting in an investigatory capacity at the direction of a
21 compliance review committee." Staff will incorporate that concept into §§ 6.2-1113 and 6.2-807,
22 which is the parallel section applicable to banks.

32 VIRGINIA ADMINISTRATIVE CODE REPLACEMENT VOLUMES

34 Lilli Hausenfluck, Virginia Administrative Code Editor, presented the Code Commission with proposed
35 replacement volumes for the Virginia Administrative Code (VAC). Supplements to the VAC are provided
36 by the publisher semi-annually. Replacement volumes generally are released as part of the fall VAC
37 supplement package. Due to the size of the total pages of combined volumes and supplements, staff
38 recommends replacing Volume 3 (Title 4-Conservation and Natural Resources), Volume 19 (Title 24-
39 Transportation), and Volume 15 (Title 18-Professional and Occupational Licensing). Due to its size,
staff recommends splitting Volume 15 into two volumes numbered 15 and 15A. Mr. Ferguson made a
motion, seconded by Senator Calhoun, to accept the recommendation. The motion was approved.

32 PUBLIC COMMENT

33 No one from the public came forward during the public comment period.

34 OTHER BUSINESS

35 Members determined that Thursdays seem to work best for meetings. The next meeting is tentatively
36 set for Thursday, June 18. Jane will confirm the June 18 date with members.

37 ADJOURN

38 Upon a motion made by Mr. Ferguson, seconded by Senator Calhoun, and approved by the
39 Commission, the meeting adjourned at 2:20 p.m.